84-1002

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge for the District of Kansas,
Respondent,

(PHYLLIS WILSON HOFFMAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Real-Parties-in-Interest.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may seek class relief without satisfying the administrative requirements of Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, when it intervenes permissively in a private action and the private plaintiff has not not sought class certification.

STATEMENT RE PARTIES

In addition to Petitioner United Telecommunications, Inc., the following companies were named as defendants in the District Court action:

United System Service, Inc.
Carolina Telephone & Telegraph Company
United Telephone Company of Ohio
Capital City Telephone Company
United Telephone Company of Iowa
United Telephone Company of Kansas, Inc.
United Telephone Company of Minnesota (Pioneer United)
United Telephone Company of Missouri
United Telephone Company of Arkansas
Midstate Telephone Company
United Telephone Company of the West
United Telephone Company of Florida
United Telephone Company of the Northwest
California-Oregon Telephone Company
East Peninsula Telephone Company
Florida Telephone Corporation
New Jersey Telephone Company
United Telephone Company of Pennsylvania (Peoples)
Gulf States-United Telephone Company (Palestine & Navasota merged into)
Palo Pinto Telephone Company, Inc.
United Telephone Company of Indiana, Inc.
United Telephone Company of Michigan (Augusta)
United Inter-Mountain Telephone Company
United Telephone Company of the Carolinas, Inc.
Keller Telephone Company
Alexandria Telephone Cable Company

Blacktown Telephone Company (Subsidiary of United Telecommunications, Inc. operated by United Telephone Company of Pennsylvania)
North Electric Company
ULI Leasing, Incorporated
North Electric Company Supply Division
Rixon Electronics, Inc.
United Computing Systems, Inc.
UCS, Inc.
United Business Communications
Central Kansas Power Company, Inc.
National Datacenter
CITICOM, Inc.
National Laboratory of Urban Communications, Inc.
The Citizens Ice Company.

Petitioner United Telecommunications, Inc. is the only parent corporation. The only non-wholly-owned subsidiaries and affiliates of United Telecommunications, Inc. are: Vista-United Telecommunications; Equipos de Telecomunicaciones North Supply Chile Limitada; and UNINET Research and Development Company.

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Statute:

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*) :
Section 705, 42 U.S.C. § 2000e-4 ..... 2, 4
Section 706, 42 U.S.C. § 2000e-5 ..... *passim*
Section 707, 42 U.S.C. § 2000e-6 ..... 2, 11, 13

Other:

Fed. R. Civ. P. 23 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ——

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge for the District of Kansas,
Respondent,

(PHYLLIS WILSON HOFFMAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Real-Parties-in-Interest.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Tenth Circuit entered on August 15, 1984, dismissing a petition for a writ of mandamus. The mandamus petition sought the vacating of orders entered on April 11 and May 24, 1984, by the Honorable Dale E. Saffels, United States District Judge for the District of Kansas.

OPINIONS BELOW

The order and opinion of the Court of Appeals are reported at 741 F.2d 312 and are reproduced in Appendix A, *infra*, pp. 1a-5a. The Memoranda and Orders of the District Court, dated April 11 and May 24, 1984, which were the subjects of the mandamus petition, are unreported. The April 11, 1984, Memorandum and Order is reproduced in Appendix B, *infra*, pp. 6a-10a; the May 24, 1984, Memorandum and Order is reproduced in Appendix C, *infra*, pp. 11a-14a. A third Memorandum and Order of the District Court, dated October 3, 1984, also is unreported and is reproduced in Appendix D, *infra*, pp. 15a-17a.

JURISDICTION

The decision of the Court of Appeals was entered on August 15, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on September 28, 1984 (Appendix E, *infra*, pp. 18a-19a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of Sections 705, 706, and 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-4, § 2000e-5, and § 2000e-6, and Rule 23, Federal Rules of Civil Procedure, are reproduced in Appendix F, *infra*, pp. 20a-24a.

STATEMENT OF THE CASE

A. The Relevant Proceedings Below

On November 5, 1976, Phyllis Wilson Hoffman ("Hoffman") brought suit in the United States District Court for the District of Kansas against United Telecommunications, Inc. ("UTI") and 38 UTI subsidiaries. UTI and its subsidiaries are engaged primarily in providing telephone services to the public; they do business in some 35 states and operate over 100 separate facilities. Hoffman had been employed from February 1972 to May 1975 in the Industrial Relations Department of United System Service, Inc. ("USSI"), a UTI subsidiary.

Hoffman's complaint (Appendix G, *infra*, pp. 25a-41a) stated that on July 23, 1975, Hoffman had filed a sex discrimination charge with the Equal Employment Opportunity Commission ("EEOC"), that on September 27, 1975, the EEOC had assumed jurisdiction of the charge, and that on August 10, 1976, Hoffman had received from the EEOC a right to sue letter. Hoffman's complaint alleged that USSI, in violation of Title VII of the Civil Rights Act of 1964, as amended, had discriminated against Hoffman on the basis of her sex with respect to initial job assignment, training and promotion opportunities, salary and termination. In addition, Hoffman sought in her complaint to represent a class composed of "all females who are, were, or might be employed by [UTI and its subsidiaries] in managerial or professional positions at its headquarters in Westwood, Kansas, and at all offices of its subsidiaries and affiliates, and who have been or continue to be or might be adversely affected by the practices complained of" (App. G, *infra*, p. 28a). As thus described in

Hoffman's complaint, the class could include approximately 40,000 individuals. The complaint further alleged that UTI and its subsidiaries were engaged in widespread discriminatory employment practices against women in violation of Title VII. Further, Hoffman stated in her complaint that her action was brought pursuant to Rules 23(a) and (b) of the Federal Rules of Civil Procedure and that the requirements for bringing such a suit were satisfied (App. G, *infra*, p. 28a-29a).

On June 30, 1977, more than two years after Hoffman had filed her charge with the EEOC and ten and one-half months after the EEOC had issued a right to sue letter, the EEOC moved to intervene permissively in this action pursuant to Rule 24(b)(1), Federal Rules of Civil Procedure, and Sections 705(g)(6) and 706(f)(1) of Title VII. The claims which the EEOC raised in its Complaint in Intervention (Appendix H, *infra*, pp. 42a-48a) were nearly identical to those raised in Hoffman's complaint and involved the same purported class of females. Indeed, the EEOC stated in a Memorandum in Support of Motion To Intervene (App. H, *infra*, pp. 49a-54a) that "[s]ince no new claims are raised by the Commission, the proposed intervention cannot be deemed to depart from the 'field of litigation' established by the original parties." Further, the EEOC expressed no intention to displace Hoffman as the class representative through the intervention. Rather, it stated that the purpose of its intervention was to assist the Court in the compilation and analysis of statistical data and to "assist in the class delineation" (App. H, *infra*, p. 50a). UTI and the other defendants objected, but on September 21, 1977, the District Court allowed the EEOC's intervention.

On December 8, 1983, after protracted discovery and briefing, the District Court entered an order asserting jurisdiction over all UTI subsidiaries named as defendants in Hoffman's complaint.

On January 27, 1984, the EEOC and Hoffman filed a joint motion in the District Court for an order allowing the EEOC to act as the representative of the putative class described in Hoffman's complaint. In support of the motion, Hoffman and the EEOC stated that their motion was for the purpose of "avoiding the discovery and hearings necessary to obtain a determination pursuant to Rule 23 of the Federal Rules of Civil Procedure in regard to certification of [Hoffman] as a class representative and certification of this action as a class action" (Memorandum in Support of Joint Motion, pp. 4-5). UTI and the other defendants opposed the motion on the grounds, *inter alia*, that its purpose was to undermine and circumvent the policies embodied in Title VII.

On April 11, 1984, the District Court granted the motion filed by the EEOC and Hoffman, and stated in its order that it was permissible for "the EEOC to act as the class representative without following the Rule 23 model" (App. B., *infra*, p. 10a). UTI and the other defendants then moved the District Court to certify the April 11 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and to stay proceedings in the case pending appeal. On May 24, 1984, the District Court denied the latter motions (App. C, *infra*, pp. 11a-14a).

On June 8, 1984, UTI and the other defendants in the District Court suit petitioned the Court of Appeals for a writ of mandamus for the review and

vacating of the District Court's orders of April 11 and May 24, 1984. The Court of Appeals, on August 7, 1984, dismissed the mandamus petition for want of jurisdiction, ruling that the District Court had not abused its discretion with respect to the challenged orders (App. A, *infra*, pp. 1a-5a). On September 28, 1984, the Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (App. E, *infra*, pp. 18a-19a).

On October 3, 1984, the District Court denied a motion by UTI and the other defendants for an order conforming Hoffman's and the EEOC's pleadings to the District Court's prior rulings. The requested order, *inter alia*, would have stricken from Hoffman's complaint the class claims set forth therein. The District Court nevertheless indicated that such action would be taken in a future, pre-trial order, declaring in this respect:

> . . . the court agrees with defendant that there is no authority to allow plaintiff Hoffman's class claims to be held 'in limbo.' The purposes of the court's ruling allowing the EEOC to proceed as class representative would not be advanced by allowing [Hoffman] to retain the option to proceed as class representative.

App. D, *infra*, p. 16a.

B. The EEOC's Failure To Comply With Section 706(b)'s Administrative Procedures

The EEOC made no attempt whatsoever to satisfy Section 706(b)'s administrative procedures before it was permitted to intervene in Hoffman's private action. Thus, the EEOC did not investigate any of the claims contained in Hoffman's charge of employment

discrimination, and neither issued a finding of "reasonable cause" nor attempted conciliation within Title VII's meaning.

C. The District Court's Rulings of April 11 and May 24, 1984

In its April 11, 1984, Memorandum and Order, the District Court acknowledged that the EEOC may file its own Section 706 complaint to vindicate individual rights only after completion of its administrative processes (App. B, *infra*, p. 9a). It also acknowledged that had not the EEOC been allowed to intervene, Hoffman, as a plaintiff in a private action, would be bound by the requirements of Rule 23 (*Idem*, p. 8a). Nevertheless, even though EEOC's administrative processes had not been initiated, much less completed, and even though there had been no Rule 23 inquiry whatsoever, the District Court decided that the EEOC could act as the representative of the class designated in Hoffman's complaint without certification as class representative and without formal class certification. As grounds for its action, the District Court declared that its decision "would further the purposes of Title VII," and "would prevent additional unnecessary delays" (*Idem*, p. 7a). The sole legal authority relied upon by the District Court was this Court's opinion in *General Telephone Company of the Northwest v. EEOC*, 446 U.S. 318 (1980), wherein it was held that Rule 23, Federal Rules of Civil Procedure, has no applicability to enforcement actions brought by the EEOC in its own name pursuant to § 706 of Title VII.

As stated, *supra*, p. 5, the District Court refused to certify its April 11, 1984, order for interlocutory

appeal pursuant to 28 U.S.C. § 1292(b). Ruling on the request for such certification, the District Court declared in a Memorandum Decision and Order, dated May 24, 1984, that its April 11 order "does not expand nor attempt to expand the scope of this litigation" and did not present "a controlling question of law" (App. C., *infra*, p. 13a).

D. The Court of Appeals' Decision

Noting that the EEOC was required "to satisfy certain administrative procedures" of Section 706(b) before initiating a law suit on its own, and that the statute permitted the EEOC to intervene in a suit brought as a private action "without requiring the satisfaction of those administrative procedures", the Court of Appeals stated: "It would be a tortured construction to conclude that when intervening, the Commission somehow becomes subject to Rule 23 when in fact the Supreme Court has made clear that the Commission is not subject to Rule 23 when bringing a direct action in the first instance" (App. A, *infra*, p. 4a). For that reason, the Court of Appeals held that the District Court "had jurisdiction to permit intervention on the terms and conditions in this case", and that it therefore lacked jurisdiction to review the District Court's action by way of mandamus (*Idem*, p. 5a).

Significantly, the Court of Appeals said nothing with respect to the question of whether the EEOC, after it has intervened permissibly in a private action in which Rule 23 has not been complied with, may nevertheless seek class relief without satisfying the administrative procedures of Section 706(b).

REASONS FOR GRANTING THE WRIT

1. The action of the District Court, as affirmed by the Court of Appeals, permits the EEOC to bypass totally the administrative prerequisites contained in Section 706 of Title VII whenever the EEOC seeks to obtain class relief by intervening in a private action. Such agency action not only subverts congressional intent, as demonstrated by the clear language of the statute, but also permits unbridled expansion of federal court litigation under Title VII.

Such errors result from the Court of Appeals' misconstruction of the nature and effect of the District Court's challenged actions. The April 11, 1984, Order of the District Court was predicated on that court's seeming belief that the strict requirements of Rule 23 would make it extremely time consuming and difficult to litigate the broad class claims asserted by Hoffman in the context of a private class action. The solution adopted by the District Court to this difficulty was to have the class claims litigated solely by the EEOC in the context of its suit in intervention and to limit Hoffman's private action to her own personal claims. The District Court erroneously relied on this Court's opinion in *General Telephone Company of the Northwest v. E.E.O.C.*, 446 U.S. 318 (1980), wherein it was held that, where the EEOC has completed the administrative processes mandated by § 706 of Title VII, the EEOC may seek class relief in a direct enforcement action without satisfying the requirements of Rule 23. Thus, the District Court's April 11, 1984, Order effectively transformed the original suit from a proposed private class action into a direct enforcement action by the EEOC. Moreover, in its October 3, 1984, Order (App. D,

infra, pp. 15a-17a), which was issued after the Circuit Court dismissed Petitioners' mandamus petition, the District Court acknowledged that this fundamental transformation of the original suit had, in fact, occurred by indicating that the private plaintiff, Hoffman, could no longer seek to press the class claims originally set forth in her complaint and that now only the EEOC could seek relief for such claims.

Despite the fundamental transformation of the original action effected by the District Court, the Court of Appeals addressed only the narrow, and irrelevant, issue of whether the EEOC must comply with Rule 23 requirements as a condition of intervention in a private Title VII action which is also proceeding as a class action.[1] The Court of Appeals thereby failed to come to grips with the significant issue raised by Petitioners' mandamus petition.[2]

2. By failing to consider or address the administrative requirements of Section 706 of Title VII, the

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[1] To the extent that Rule 23 is here involved at all, it would become relevant only at the remedy stage. Thus, if certiorari is granted, this Court may wish to consider the further issue of whether the EEOC, having irrevocably bypassed its administrative processes, may remedy the jurisdictional infirmity in its present action by either the EEOC or the private plaintiff demonstrating compliance with the requirements of Rule 23.

[2] Petitioners argued to the Court of Appeals that "where the EEOC neglects to process a claim or claims through its administrative process, it is barred from seeking relief for such claims in a direct suit brought by it pursuant to § 706" and, therefore, that "the EEOC may not, in the guise of a permissive intervenor, circumvent this limitation on its authority and seek to litigate independently class claims which have never been made the subject of the required administrative processes." Petitioners' Brief In Support of Mandamus Petition, p. 20.

Court of Appeals overlooked the critical nature of that section.[3] Section 706 sets forth an "integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in Federal court." *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355, 359 (1977). Discussing this statutory mechanism in *Occidental Life*, the Court stated that the EEOC is "required to investigate the charge and determine whether there is reasonable cause to believe it is true . . ." and, once finding reasonable cause, "it shall endeavor to eliminate any such unlawful employment practice by . . . conciliation." *Ibid.* If an acceptable conciliation agreement cannot be secured, then and only then may the EEOC bring a civil action. *Id.* at 360.[4] Further, in *Occidental Life*, the Court noted that although the 1972 Amendments to Title VII gave the EEOC the addi-

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[3] The Court of Appeals apparently believed that because the failure to complete the § 706 administrative processes does not bar the EEOC's intervention into a private suit, this failure had no further relevance. However, Petitioners do not seek to challenge the EEOC's intervention in the first instance. Rather, the petition for mandamus raised the far different matter of whether, once having intervened, the EEOC could thereafter litigate class claims independently of the underlying private, individual action.

[4] Unlike the EEOC, the private litigant's right to sue in federal court is not contingent upon the prior completion of these administrative procedures. See Section 706(f). The statutory distinction between private actions and EEOC suits under Title VII emphasizes the importance Congress attached to the necessity of the EEOC meeting its administrative requirements so that conciliation would precede EEOC litigation. Furthermore, Section 707(e) specifically requires that pattern or practice suits brought by the EEOC must "be conducted in accordance with the procedures set forth in Section [706]."

tional enforcement power of instituting a civil action, Congress preserved the EEOC's administrative functions as set forth in § 706 of the Act. *Id.* at 368. The procedural structure of the Act, the Court said, makes it clear that "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties." Rather, the Court continued, the Act was designed to ensure that the EEOC as a federal administrative agency would investigate and attempt to settle employment discrimination claims in an informal, noncoercive fashion. *Ibid.* Accordingly, the Court concluded, "the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Ibid.*

In allowing the EEOC to abandon Section 706's administrative requirements, the Court of Appeals ignored this Court's pronouncements in *Occidental Life.* Thus, the Court of Appeals focused erroneously on whether the EEOC, *before intervening*, had to meet Section 706's administrative requirements and did not address the more pertinent question of whether the EEOC, *before seeking class relief*, had to satisfy the necessary administrative prerequisites. This error led the Court of Appeals to reject Petitioners' contentions because it "would be a tortured construction to conclude that when intervening, the Commission somehow becomes subject to Rule 23 when in fact the Supreme Court has made clear that the Commission is not subject to Rule 23 when bringing a direct action in the first instance." (App. A, *infra*, p. 4a).

In fact, it is the Court of Appeals' decision that is based upon a misconstruction of Title VII. Thus, the

District Court's action has resulted in the establishment of two separate and independent suits, one by the private plaintiff Hoffman seeking relief for her individual claims only, and another by the EEOC seeking relief on behalf of an extremely large and variegated class of individuals with claims involving a myriad of differing factual and legal circumstances. It is beyond dispute that had the EEOC sought to bring its separate action as a direct suit in another federal court, that action would have been dismissed because of the EEOC's failure to complete its administrative processes with regard to the claims it was seeking to litigate. The Court of Appeals, however, in actuality, although not in name, allowed such a separate EEOC action by focusing exclusively on the procedural quirk that the EEOC had decided to initiate its suit through the route of permissive intervention in a private action rather than through a direct enforcement action under § 706 or § 707. In reaching this result, the Court of Appeals has sanctioned a procedure which would allow the EEOC to use intervention as a route to circumvent its statutory duties in every case and expand private, individual actions into ones seeking broad class relief, including relief for claims encompassing different bases of discrimination and employment issues. In this connection, the district court in *Bell v. McDermott & Company, Inc.*, 30 EPD ¶ 33,310, p. 28,312 (E.D. La. 1982) recognized the error of approving such procedure by stating that "it would be highly prejudicial to the defendant . . . to allow the EEOC to do indirectly what it cannot do directly. . . . This was not the intent of Congress in providing for intervention." *Id.* at p. 28,315.

3. Mandamus is a proper remedy when a lower court impermissibly expands its jurisdiction. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953). Here, such an impermissible expansion has been undertaken by the District Court. Thus, as a general principle, a court may not entertain new claims raised by a permissive intervenor in addition to those raised by the original plaintiff unless the intervenor establishes that the court possesses a separate basis of jurisdiction on which to adjudicate the additional claims. *Blake v. Pallan*, 554 F.2d 947, 956 (9th Cir. 1977); *Reedsburg Bank v. Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975).

In the context of Title VII, the EEOC as an intervenor can establish such a separate jurisdictional basis only where it has met the prerequisites to a direct suit in its own name on the additional claims—that is, as set forth above, by satisfying the § 706 requirements of investigation, reasonable cause finding, and conciliation effort. See, *Horn v. Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982), where the Sixth Circuit held that the EEOC could not proceed as an intervenor on appeal when the private plaintiff had settled the underlying action after being denied class certification. In the *Horn* case, the Court found that the EEOC had never issued a determination of reasonable cause or engaged in conciliation, and therefore concluded that the EEOC was "without an independent jurisdictional basis for litigating here against Eltra." *Id.* at 441. In this case, it is not disputed that the EEOC has never investigated any charge (including Hoffman's) which encompasses any of the

claims it now seeks to litigate, has never made a finding of reasonable cause on any of those claims, and has never attempted to conciliate with any of the Petitioners as to those claims. In these circumstances, the District Court's order holding that the EEOC may independently litigate class claims in this action represents an impermissible expansion of the District Court's statutory jurisdiction which should have been remedied by the issuance of the requested writ of mandamus.[5]

4. The Court of Appeals' statutory interpretation which countenanced the actions by the EEOC in this case raises a significant and recurring issue in the administration of Title VII and its enforcement in the federal courts. Simply put, that issue is whether the EEOC will be allowed to use permissive intervention into individual private Title VII suits as a device for circumventing the statutory requirements imposed on it when it brings a direct suit in its own

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[5] While the final order doctrine is not applicable where review is sought via a petition for mandamus, it should be noted that the decisions of the District Court and the Court of Appeals are, for all practical purposes in this case, "final orders." Thus, the District Court has twice indicated its belief that the challenged procedure is appropriate and, as evidenced by its October 3, 1984 Order (App. D, *infra*, pp. 15a-17a), is now proceeding to try this case on that basis. Similarly, the Court of Appeals, while technically denying issuance of the requested writ on the basis of lack of jurisdiction to do so, reached this holding only after considering the case substantively. Thus, it seems clear that the Court of Appeals would not reach a different conclusion if this matter were to be appealed after entry of a final judgment by the District Court. In these circumstances, there exists no persuasive reason for postponing review of this important issue until after a trial has been completed and the normal appeal process has run its course.

name alleging pattern-and-practice-type claims, and, through that device, rid itself of the apparently distasteful necessity of actually having to investigate, find reasonable cause, and attempt conciliation with respect to such claims. Under the ruling of the Court of Appeals, the EEOC, without having fulfilled the statutorily and judicially mandated prerequisites to its own suit, is empowered to use the unsubstantiated and self-serving allegations made by a single employee in a private Title VII suit as a springboard to bring a federal court action challenging a company's entire personnel system and seeking relief for every employee in the company. Stated somewhat differently, if the position of the Court of Appeals prevails, future federal court litigation by the EEOC will be limited not by the scope of the EEOC's investigative and conciliation efforts, but by the seemingly unlimited scope of the EEOC's litigating zeal. The resulting flood of lengthy and highly complex litigation will, moreover, be a highly unwelcome addition to the already overcrowded federal court dockets.

Furthermore, the procedure approved of by the Court of Appeals will sound the death knell for the EEOC's administrative processes as a viable method for resolving broad based allegations of discrimination, for there will be no incentive for the EEOC to comply with the statutory directives of investigation, reasonable cause finding, and conciliation. Although it is true that there must exist a pre-existing private Title VII action in which the EEOC may intervene for the EEOC to utilize the procedure sanctioned by the Court of Appeals, it is obvious that this precondition is likely to exist, either with or without the

EEOC's contrivance, at any given time for employers of any size.

It is noteworthy that the EEOC has, on numerous occasions in the past, attempted to use intervention as a device for circumventing its administrative duties. In nearly every instance, the EEOC was rebuffed in its attempts, including the one instance where the issue was addressed by a Court of Appeals. *Horn v. Eltra Corporation, supra,* 686 F.2d at 440 (6th Cir. 1982).[6] However, now with the ruling of the Court of Appeals below, the Circuits are effectively divided on the propriety of this circumventing procedure and a troubling precedent has been established which will encourage the EEOC to utilize the procedure even more frequently in future suits.

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[6] *Horn, supra,* differs from the instant case in that there the EEOC attempted to use the device of intervention, not for the purpose of securing class representation, but rather for the purpose of continuing litigation after the private action had been settled. In the following District Court cases, the EEOC likewise was unsuccessful in its attempt to use this device to expand the scope of pending, private litigation: *Bell v. McDermott & Company, Inc., supra*; *Benson v. Little Rock Hilton Inn,* 87 F.R.D. 447 (E.D. Ark. 1980); *Troup v. Piper, Jaffray & Hopwood, Inc.,* 16 FEP Cases (BNA) 1554 (D. Minn. 1975); *National Organization for Women, Inc. v. Minnesota Mining and Manufacturing Co.,* 73 F.R.D. 467 (D. Minn. 1977); *Jones v. Holy Cross Hospital Silver Spring, Inc.,* 64 F.R.D. 586 (D. Md. 1974). *But see, Stuart v. Hewlett-Packard,* 66 F.R.D. 73 (E.D. Mich. 1975), where the EEOC was permitted to pursue class claims upon intervening, but the District Court did not address the issue here presented.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 24, 1984

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-1811

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge
for the District of Kansas,
Respondent,

PHYLLIS WILSON HOFFMAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent and
Real-Parties-in-Interest.

PETITION FOR WRIT OF MANDAMUS

Before DOYLE, McKAY and SEYMOUR, Circuit Judges.

McKAY, Circuit Judge.

This is a petition for a writ of mandamus. The underlying action was commenced by an employee of petitioner, seeking relief from alleged descrimination and seeking certification of a class of females of which she would allegedly be a proper representative.

Nearly a year after the action was commenced, the Equal Employment Opportunity Commission (EEOC or Commission) filed a motion for leave to intervene pursuant to sections 705(g)(6) and 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-4(g)(6) and 2000e-5(f)(1) (1982), and Rule 24(b) of the Federal Rules of Civil Procedure. The Commission sought to obtain relief on behalf of the same group of individuals whom the individual plaintiff had sought to represent as a class representative. In seeking intervention, the Commission certified that the case was of general public importance. 42 U.S.C. § 2000e-5(f)(1).

In 1977, the district court granted the EEOC's motion to intervene, pursuant to Federal Rule of Civil Procedure 24(b)(1) and sections 2000e-4(g)(6) and (f)(1). After an incredible delay of six years (not the fault of the court), the cause and details of which are not relevant to this disposition, the EEOC requested authority to seek relief for the group of individuals identified in the Commission's complaint. Over objection, the trial court permitted the EEOC to seek relief on behalf of the class without following the procedures for class certification set forth in Federal Rules of Civil Procedure 23.

Petitioner seeks mandamus in this court to compel the trial court to follow Rule 23 before letting the Commission represent persons other than the private plaintiff who commenced the action in the first instance and, in the alternative, to compel the court to certify this dispute for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1982).

When the Commission brings the action for discrimination in its own name neither it nor the trial

court is required to comply with Rule 23 in order for the Commission to seek class-wide relief. *General Telephone Co. v. EEOC*, 446 U.S. 318, 323-34 (1980). "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Id.* at 326. In enforcing these suits the EEOC "is not merely a proxy for the victims of discrimination. . . ." *Id.* It follows, as the Supreme Court noted, that its "enforcement suits should not be considered representative actions subject to Rule 23." *Id.*

Petitioner argues that when the EEOC acts not as the initiator of a suit, but as an intervenor, the trial court is without jurisdiction to permit that intervention on behalf of a class without making the EEOC comply with Rule 23. Title VII was amended in 1972 to give the EEOC more meaningful enforcement powers. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-5 (1982)). The relevant portions of the amended section permitting the Commission to intervene in a previously commenced private action has no such limitation. In relevant part, it provides that "[u]pon timely application, the court may, in its discretion, permit the Commission . . . to intervene in . . . civil actions upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1) (1982). In this case, the Commission certified that the case was of general public importance. The trial court, in exercise of its discretion, permitted the intervention. Both the spirit and letter of the statute permitting intervention were satisfied. Not only the language of the statute, but the legislative history, supports the

view that the purpose of intervention is vindication of the general public interest. When Senator Williams introduced the amendment to permit the Commission to intervene, he explained:

> The amendment is to clear up an inconsistency whereby the general counsel of the Commission may bring a civil action for the Commission, but might not be able to protect the *Commission's interest* in a case where [a] private litigant is involved.

118 Cong. R. 4814 (1972) (emphasis added).

From the language of the Act and the legislative history, it is apparent that Congress viewed the Commission's role in suits initiated by it or in which it intervened to serve the identical purpose.

That Congress required the Commission to satisfy certain administrative procedures before initiating a law suit on its own does not require us to find an ambiguity in the plain language of Section 706(f)(1), which permits intervention without requiring the satisfaction of those administrative procedures. It would be a tortured construction to conclude that when intervening, the Commission somehow becomes subject to Rule 23 when in fact the Supreme Court has made clear that the Commission is not subject to Rule 23 when bringing a direct action in the first instance. In the section permitting intervention Congress required only two prerequisites: (1) certification by the Commission that its intervention is in the public interest; and (2) the exercise of discretion by the trial court before permitting intervention. If Congress had meant Rule 23 to be a substitute for the investigative procedure required in a direct ac-

tion, it would have said so. To require compliance with Rule 23 would contradict the plain reasoning and mandate of the Supreme Court in *General Telephone.*

Since the Commission is not required to satisfy the mandate of Rule 23 when it intervenes in a private action, the trial court clearly had jurisdiction to permit intervention on the terms and conditions in this case. As the trial court had jurisdiction to act as it did, we are without jurisdiction to review its action by way of mandamus. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980). The trial court's exercise of discretion in determining whether to permit intervention is not reviewable by writ of mandamus absent a judicial usurpation of power. We find no abuse of that discretion. For the reasons given, we are without jurisdiction to order the trial court to certify the issue here discussed for interlocutory appeal.

The petition for writ of mandamus is dismissed for want of jurisdiction in this court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Civil Action No. 76-223-C2

PHYLLIS WILSON HOFFMAN,
Plaintiff,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

Plaintiff filed her complaint in 1976 alleging various acts of sexual discrimination in violation of Title VII of the Civil Rights Act of 1964. Her complaint was brought on behalf of herself and all other persons similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Early in the case, discovery on the class action issues was stayed pending resolution of certain jurisdictional issues. After numerous delays, those jurisdictional issues were resolved by order of this court dated December 8, 1983. [See *Hoffman v. United Telecommunications, Inc.*, 575 F. Supp. 1463 (D. Kan. 1983)].

Now, years after the filing of the complaint, the parties are in a posture to begin discovery on the class action issues. However, plaintiff and plaintiff-intervenor, the Equal Employment Opportunity Commission [hereinafter EEOC], have proposed an alternative to proceeding under the Rule 23 model in order to expedite the progress of this case. They have filed a joint motion to allow the EEOC to act as representative of the class defined in plaintiff's petition and to seek relief for the class without its certification as class representative and without formal class certification. The court finds that such an order would further the purposes of Title VII, and the order should be granted on the basis alone. The court further finds that such an order would prevent additional unnecessary delays, a result which is also encouraged by the policies of Title VII.

A complaint in a Title VII action against a private employer may be filed either by the EEOC or by an individual plaintiff. 42 U.S.C. § 2000e-5(f). The EEOC may file a complaint only after completion of its administrative process, which includes a finding of reasonable cause to believe there has been discrimination and an effort by the EEOC at conciliation with the defendant. *Id.* A plaintiff other than the EEOC may file an action under Title VII only after receipt of a right-to-sue letter from the EEOC. *Id.* A right-to-sue letter is issued by the EEOC following the completion of its administrative process, or upon request of the complainant after the EEOC has had jurisdiction for one hundred eighty (180) days. *Id.* Although the administrative process of Title VII is intended to encourage the prompt resolution of discrimination claims, often the adminis-

trative process is a time-consuming matter. In fact, by 1977 the EEOC had a back log of 99,000 charges. *EEOC, 17th Annual Report*, at p. 12.

Plaintiff Hoffman herein chose not to await the possible lengthy completion of the EEOC's administrative process. Rather, after the EEOC had considered the matter for the mandatory 180 days, plaintiff requested and received, in accordance with 42 U.S.C. § 2000e-5(f)(1), a right-to-sue letter. After plaintiff filed this private action, the EEOC moved to enter the case as plaintiff-intervenor. Judge O'Connor granted the motion to intervene on September 21, 1977, stating: "The court finds that the EEOC's application for intervention is timely; that intervention will cause, if anything, no more than the ordinary and minimal delay and prejudice that often attends addition of a new party to a lawsuit; that EEOC intervention may be helpful in illuminating the issues herein and expediting resolution of the respective claims of the parties; that the case is one of general public importance; and that the claims of the EEOC involve questions of law and fact common to those of the main action."

The question before the court at this time is whether the EEOC may act as class representative without following the Rule 23 model when it has intervened in an action. The law is now clear that when the EEOC brings an action in its own name pursuant to 42 U.S.C. § 2000e-5, Rule 23 is not applicable. *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318, 323 (1980). The law is also clear that if this were purely a private action by the plaintiff, without intervention by the EEOC, plaintiff would be bound by the requirements of Rule 23. *General Tele-*

phone of the Southwest v. Falcon, 457 U.S. 147 (1982).

The essential difference between the EEOC bringing suit in its own name and the EEOC intervening in a suit brought as a private action is that to bring the direct suit the EEOC must complete its administrative process, while to intervene the matter must be certified as "of general public importance." In *General Telephone of the Northwest, supra*, wherein the United States Supreme Court held that Rule 23 did not apply to direct suits brought by the EEOC, the court did not rely on the completion of the administrative process by the EEOC as the basis of its ruling. The court commented that "[t]he purpose of the amendments (1972 amendments allowing direct action by EEOC), plainly enough, was to secure more effective enforcement of Title VII." *General Telephone of the Northwest, supra*, 446 U.S. at 325. Congress perceived that the lack of meaningful enforcement powers by the EEOC was a major flaw in Title VII. *Id.*

In the opinion of this court, Title VII's policy of preventing employment discrimination is served not only when the EEOC brings an enforcement action in its own name, but also when it intervenes in a private action. "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *General Telephone of the Northwest, supra*, 446 U.S. at 326. In actions brought by the EEOC to enforce "class rights, Congress meant to broaden the availability of relief, not to force the Rule 23 procedure to be used. *Id.* at 329. Thus "forcing EEOC civil actions into the Rule 23

model would in many cases distort the Rule as it is commonly interpreted and in others foreclose enforcement actions not satisfying prevailing Rule 23 standards but seemingly authorized by § 706(f)(1) [42 U.S.C. § 20003-5(f)(1)]." *Id.* at 329-30.

Further, in the Tenth Circuit, the filing of a private Title VII action cuts off the EEOC's ability to bring suit in its own name based on the private plaintiffs' charge, and relegates the EEOC to intervention in the private suit as its only means of enforcing Title VII. *EEOC v. Continental Oil Co.*, 548 F.2d 88 (10th Cir. 1977). Therefore, allowing the EEOC to act as class representative outside the Rule 23 model is a reasonable method of furthering the purposes of the legislation.

IT IS BY THE COURT THEREFORE ORDERE [sic] that the joint motion of the plaintiff and plaintiff-intervenor for an order allowing the EEOC to act as the class representative without following the Rule 23 model is hereby granted.

DATED: This 11th day of April, 1984, at Kansas City Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 76-223-C2

PHYLLIS WILSON HOFFMAN,
Plaintiff,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on defendants' motion to amend this court's April 11, 1984, order to allow Section 1292(b) certification and to stay further district court proceedings pending appeal.

Section 1292(b), Title 28, United States Code, provides, in part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

> from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

This certification process is narrowly construed, and all three criteria above noted must be met before certification is appropriate.

Defendants allege this court's order of April 11, 1984, in which the Equal Employment Opportunity Commission was allowed to act as representative of the class defined in plaintiff's petition, and to seek relief for the class without its certification as class representative and without formal class certification, meets the first criterion for certification in that it involves a controlling question of law.

The Ninth Circuit, in *In Re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982), noted that Congress did not specifically define what it meant by the word "controlling." The court continued, however, stating, "the legislative history of 1292(b) indicates that this action was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation. *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam); *Milbert v. Bison Laboratories*, 260 F.2d 431, 433-35 (3d Cir. 1958)." The "exceptional circumstances or situation" standard applicable to § 1292(b) was given approval in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). The question presented by defendants' motion then is whether or not this court's decision to try this case as a class action without making findings under Rule 23 as to numerosity, commonality, typicality and adequacy of repre-

sentation presents a controlling question of law, *i.e.*, an exceptional circumstance.

Defendants assert the court's order will have a profound effect on the scope of this litigation and the manner in which it is tried, and therefore it presents a controlling question of law. Defendants argue that because of plaintiff's employment history, she might, at best, be only a representative of a very limited class, and if this assertion is in fact found to be correct on appeal after a trial on the merits, the court of appeals would have no choice but to reverse the decision of the court and order it to start anew, beginning with the class certification hearing.

The court has examined the order of April 11, 1984, and finds the order does not expand nor attempt to expand the scope of this litigation. The court further determines that plaintiff is appropriate to represent the class of female applicants for employment at United Telecommunications, Inc. who were never hired. Defendants have not, therefore, presented a controlling question of law and have failed to meet the first criterion necessary for certification of an appeal under § 1292(b).

As the court noted above, failure to meet any of the criteria makes certification of the order inappropriate. Therefore, defendants' motion for § 1292(b) certification of the April 11, 1984, order and for stay pending appeal should be denied.

IT IS BY THE COURT THEREFORE ORDERED that defendants' motion for § 1292(b) certification of this court's April 11, 1984, order is hereby denied. IT IS FURTHER ORDERED that

defendants' motion for stay pending appeal is hereby denied.

DATED: This 24th day of May, 1984, at Kansas City, Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 76-223-C2

PHYLLIS WILSON HOFFMAN,
Plaintiff,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on the motion of defendants for an order conforming the pleadings to this court's prior rulings, and for an order severing plaintiff Hoffman's individual claim, and setting a trial date.

On April 11, 1984, this court entered an order allowing the Equal Employment Opportunity Commission [hereinafter EEOC] to act as representative of the class defined in plaintiff's complaint and to seek relief for the class without its certification as class representative and without formal class certification pursuant to Rule 23, Federal Rules of Civil Procedure. Defendants sought mandamus in the

United States Court of Appeals for the Tenth Circuit to compel this court to follow Rule 23 before allowing the EEOC to represent persons other than plaintiff, or in the alternative to compel the court to certify the dispute for interlocutory appeal. The petition for writ of mandamus was dismissed for want of jurisdiction. *United Telecommunications Inc. v. Saffels*, —— F.2d —— (No. 84-1811, 8/15/84), *reh. denied* —— F.2d —— (10th Cir. 10/01/84).

In light of the court's April 11, 1984, order, defendants contend that the pleadings of plaintiff and the plaintiff-intervenor should be amended to reflect the respective status of such parties by: (a) striking all class claims from the complaint of plaintiff, and (b) entering an order directing the plaintiff-intervenor to amend the allegations of class discrimination in its complaint to conform to those of plaintiff's complaint.

Plaintiff opposes defendants' motion and claims that she has not abandoned her claims requesting class relief. On this point, the court agrees with defendant that there is no authority to allow plaintiff Hoffman's class claims to be held "in limbo." The purposes of the court's ruling allowing the EEOC to proceed as class representative would not be advanced by allowing plaintiff to retain the option to proceed as class representative. Further, it would not be fair to defendants to require them to prepare their case under such circumstances. Nor would such circumstances lead to the expeditious progress of this already very old case.

Rather than requiring plaintiff and plaintiff-intervenor to amend their pleadings, however, the court shall direct the plaintiff and plaintiff-intervenor

to conform their claims to the rulings of this court at the time of the pre-trial conference and in the court's pre-trial order. The court does not feel the issues are so confused that immediate amendment to the pleadings is necessary. Further, in this court the claims made in the pre-trial order are considered to supersede the pleadings. Therefore, the court shall deny defendants' motion for an order conforming the pleadings to this court's prior rulings in this case.

As to defendants' motion to sever plaintiff Hoffman's individual claim and to set a trial date, the court finds that such an action by the court at this time would be premature. Plaintiff has individual claims and is also a member of the class whose interests are being protected by the plaintiff-intervenor. Following the entry of the pre-trial order in this case, the propriety or impropriety of severing plaintiff Hoffman's individual claims may be more easily ascertained by this court.

IT IS BY THE COURT THEREFORE ORDERED that defendants' motion for an order conforming the pleadings to this court's prior rulings in this case is hereby denied. IT IS FURTHER ORDERED that defendants' motion to sever plaintiff Hoffman's individual claim and to set a trial date is hereby denied.

DATED: This 3rd day of October, 1984, at Kansas City, Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge

APPENDIX E

SEPTEMBER TERM—September 28, 1984

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay and Honorable Stephanie K. Seymour, Circuit Judges.

No. 84-1811

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge
for the District of Kansas,
Respondent,

PHYLLIS WILSON HOFFMAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Real-Parties-In-Interest.

This matter comes on for consideration of petitioners' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Doyle, McKay and Seymour, to whom the cause was argued and submitted.

The petition for rehearing having been denied by the panel to whom the cause was argued and submitted, and no member of the panel nor judge in regular service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Judge James K. Logan did not participate.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX F

1. The relevant provisions of Sections 705, 706, and 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-4, § 2000e-5, and § 2000e-6, are as follows:

Sec. 705(g)

The Commission shall have power—

* * * *

(6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

* * * *

Sec. 706(b)

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. * * * If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it

shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, concilation, and persuasion.

* * * *

Sec. 706(f)

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. * * * If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General

in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. * * * Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * * *

Sec. 707(e)

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

2. The relevant provisions of Rule 23, Federal Rules of Civil Procedure, are as follows:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final

injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

* * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 76-223-C2

PHYLLIS WILSON HOFFMAN,
12216 West 79th Terrace,
Lenexa, Kansas 66215, on
behalf of herself and all other
persons similarly situated,

Plaintiff,

v.

UNITED TELECOMMUNICATIONS, INC.,
a Kansas corporation,
2330 Johnson Drive
Westwood, Kansas,
together with its subsidiaries and affiliates
in the United Telephone System:

United System Service, Inc.

Carolina Telephone & Telegraph Company

United Telephone Company of Ohio

Midwest Group:
- Capital City Telephone Company
- United Telephone Company of Iowa
- United Telephone Company of Kansas, Inc.
- United Telephone Company of Minnesota (Pioneer United)
- United Telephone Company of Missouri
- United Telephone Company of Arkansas
- Midstate Telephone Company
- United Telephone Company of the West

United Telephone Company of Florida

Northwest Group:
- United Telephone Company of the Northwest
- California-Oregon Telephone Company
- East Peninsula Telephone Company

Florida Telephone Corporation

Eastern Group:
- New Jersey Telephone Company
- United Telephone Company of Pennsylvania (Peoples)

Gulf States-United Telephone Company (Palestine & Navasota merged into)

Palo Pinto Telephone Company, Inc.

United Telephone Company of Indiana, Inc.

United Telephone Company of Michigan (Augusta)

Southeast Group:
- United Inter-Mountain Telephone Company
- United Telephone Company of the Carolinas, Inc.

Keller Telephone Company

Alexandria Telephone Cable Company

Blacktown Telephone Company (Subsidiary of United Telecommunications, Inc. operated by United Telephone Company of Pennsylvania)

Non-Telephone:
- North Electric Company
- ULI Leasing, Incorporated
- North Electric Company Supply Division
- Rixon Electronics, Inc.
- United Computing Systems, Inc.
- UCS, Ind.

United Business Communications
Central Kansas Power Company, Inc.
United System Service, Inc.
National Datacenter
CITCOM, Inc.
National Laboratory of Urban Communications, Inc.
The Citizens Ice Company

and any other subsidiaries and affiliates not specifically set out,

SERVE:

Registered agent for United Telecommunications, Inc., P.H. Henson, 2330 Johnson Drive, Westwood, Kansas 66205;
and

UNITED SYSTEM SERVICE, INC.,
A Kansas Corporation,

SERVE:

Paul H. Henson, 2330 Johnson Drive, Westwood, Shawnee Mission, Kansas 66205,

Defendants.

COMPLAINT

I.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, 42 U.S.C. § 2000e-5(f) as amended, and 28 U.S.C. § 2201 and 2202, giving the Federal District Court original jurisdic-

tion of civil actions to recover damages and to secure redress by way of equitable and other relief for deprivation of civil and constitutional rights. This is a suit authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The jursdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by 42 U.S.C. § 2000e et seq., providing for injunctive and other relief against sex discrimination in employment.

II.

VENUE

Unlawful employment practices complained of herein were and are being committed within the jurisdiction of the United States District Court for the District of Kansas.

III.

ALLEGATIONS REGARDING CLASS ACTION

A. Plaintiff Phyllis Wilson Hoffman brings this action on behalf of herself and all other persons similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class which plaintiff represents is composed of all females who are, were, or might be employed by the defendants in managerial or professional positions at its headquarters in Westwood, Kansas, and at all offices of its subsidiaries and affiliates, and who have been or continue to be or might be adversely affected by the practices complained of herein.

B. There are common questions of law and fact affecting the rights of members of the class who are, were or continue to be limited, classified and dis-

criminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of their sex. These persons are so numerous that joinder of all members is impractical. A common relief is sought. The interest of said class is adequately represented by the plaintiff herein and the claims of the named plaintiff are typical of the claims of the class. Defendants have acted or refused to act on grounds generally applicable to the class.

IV.

NATURE OF PROCEEDING

A. This is a proceeding for a declaratory judgment as to the rights of the plaintiff and the class she represents and for a preliminary and permanent injunction restraining defendants from maintaining a policy, practice, custom or usage of:

(1) Discriminating against plaintiff and other persons in the class she represents because of sex with respect to compensation, terms, conditions and privileges of employment.

(2) Limiting, segregating and classifying employees and applicants for employment of defendants in ways which deprive or tend to deprive plaintiff and other persons in the class she represents of equal employment opportunities and otherwise adversely affect their status as employees because of their sex.

B. Plaintiff and the class she represents also seek back pay, damages, and attorneys fees for the violations of their rights as alleged herein.

V.

PARTIES

A. Plaintiffs Phyllis Wilson Hoffman is a Caucasian female citizen of the United States and a resident of the State of Kansas, residing at 12216 West 79th Terrace, Lenexa, Kansas. Plaintiff Phyllis Wilson Hoffman was employed by Defendant United System Service, Inc., and United Telecommunications, Inc. as part of the United Telephone System at its office in Westwood, Kansas. Defendant United System Service, Inc. terminated plaintiff Phyllis Wilson Hoffman's employment with the company on May 9, 1975.

B. Defendant United Telecommunications, Inc. is and has been at all times material to this action a corporation organized and existing under and by virtue of the laws of the State of Kansas and doing business in the State of Kansas and the City of Westwood, Kansas. Said defendant company operates and maintains an office and is an employer within the meaning of 42 U.S.C. § 2000e in that at all times material to this action said defendant company has been engaged in an industry affecting commerce, has employed at least 50 persons for each working day in each of 20 or more calendar weeks for each year, and has been engaged in the manufacture and production of products for interstate commerce within the meaning of the Act.

Defendant United Telecommunications, Inc. is a holding company which operates, administers and controls the United Telephone System which comprises the following subsidiaries and affiliates: United System Service, Inc.; Carolina Telephone & Telegraph Company; United Telephone Company of

Ohio; Midwest Group which includes Capital City Telephone Company, United Telephone Company of Iowa, United Telephone Company of Kansas, Inc., United Telephone Company of Minnesota (Pioneer United), United Telephone Company of Missouri, United Telephone Company of Arkansas, Midstate Telephone Company, and United Telephone Company of the West; United Telephone Company of Florida; Northwest Group which includes United Telephone Company of the Northwest, California-Oregon Telephone Company, and East Peninsula Telephone Company; Florida Telephone Corporation; Eastern Group which includes New Jersey Telephone Company, United Telephone Company of Pennsylvania (Peoples), and New Jersey Telephone Company; Gulf States-United Telephone Company (Palestine & Navasota merged into); Palo Pinto Telephone Company, Inc.; United Telephone Company of Indiana, Ind.; United Telephone Company of Michigan (Augusta); Southeast Group which includes United Inter-Mountain Telephone Company, and United Telephone Company of the Carolinas; Inc.; Keller Telephone Company; Alexandria Telephone Cable Company; Blacktown Telephone Company (subsidiary of United Telecommunications, Inc. operated by United Telephone Company of Pennsylvania); and Non-Telephone subsidiaries and affiliates including North Electric Company; ULI Leasing, Incorporated; North Electric Company Supply Division; Rixon Electronics, Inc.; United Computing Systems, Inc.; UCS, Inc.; United Business Communications; Central Kansas Power Company, Inc.; United Systems Service, Inc.; National Datacenter; CITCOM, Inc.; National Laboratory of Urban Communications, Inc.; and the Citizens Ice Company.

Defendant United Telecommunications, Inc. exercises substantial and direct control over these subsidiaries and affiliates in that it developes and disseminates system-wide personnel policy which must be followed by each company; it reviews the operating costs of each subsidiary and affiliate company monthly at its headquarters in Westwood, Kansas, and determines and approves the operating budgets of each subsidiary and affiliate; it administers all retirement and pension funds for employees of all subsidiaries and affiliates at its headquarters in Westwood, Kansas; it processes the payroll of employees at its headquarters in Westwood, Kansas, for certain of its subsidiaries and affiliates, including those in the "Midwest Group"; the officers and/or directors of United Telecommunications, Inc. serve as members of the Board of Directors and sometimes as officers of all the subsidiaries and affiliate companies.

C. Defendant United System Service, Inc. is and has been at all times material to this action a corporation and existing under and by virtue of the laws of the State of Kansas and doing business in the State of Kansas and the City of Westwood, Kansas. Said defendant company operates and maintains an office and is an employer within the meaning of 42 U.S.C. § 2000e in that at all times material to this action said defendant company has been engaged in an industry affecting commerce, has employed at least 50 persons for each working day in each of 20 or more calendar weeks for each year, and has been engaged in the manufacture and production of products for interstate commerce within the meaning of the Act.

Defendant United System Service, Inc. is a subsidiary of United Telecommunications, Inc. and part of the United Telephone System and is the branch of

that system which directly employed the plaintiff Phyllis Wilson Hoffman. At all times mentioned herein defendant United System Service, Inc. has been acting under practices, policies and procedures established by its parent corporation United Telecommunications, Inc. especially with regard to personnel policies, so that whatever actions were taken by defendant United Systems Service, Inc. are attributable to defendant United Telecommunications, Inc. All acts alleged herein as committed by defendant United Systems Service, Inc. should be imputed as having also been the acts of defendant United Telecommunications, Inc.

VI.

ADMINISTRATIVE PROCEDURES

A. On July 23, 1975, within 90 days of the occurrence of the continuing acts of which she complains, plaintiff Phyllis Wilson Hoffman, a Caucasian female employee of the defendant United System Service, Inc. and United Telecommunications, Inc. filed written charges, under oath, with the Equal Employment Opportunity Commission and with the Kansas Commission on Civil Rights, alleging denial by defendants United System Service, Inc. and United Telecommunications, Inc. of rights of plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended. Copies of said charge are attached hereto and made a part hereof and marked as plaintiff's Exhibits A and B.

B. On September 27, 1975, the Equal Employment Opportunity Commission assumed jurisdiction of said charges after the sixty (60) day deferral period for

the Kansas Commission on Civil Rights to seek relief for plaintiff expired.

C. On or about August 10, 1976, the Equal Employment Opportunity Commission advised plaintiff that the Commission had not filed a civil action with respect to plaintiff's charges as provided by Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, et seq.; and that the plaintiff was entitled to institute a civil action in the appropriate Federal District Court within ninety (90) days of receipt of said letter. A copy of said "Notice of Right to Sue within 90 Days" is attached hereto and made a part hereof and marked as plaintiff's Exhibit C.

D. Plaintiff has, therefore, filed this action within said 90 days.

VII.

STATEMENT OF CLAIM

A. The discriminatory practices instituted and/or maintained by the defendants include, but are not limited to, the following acts made unlawful by § 703 and § 704 of Title VII of the Civil Rights Act of 1964, as amended:

1. Establishing job classifications segregated on the basis of sex;

2. Establishing promotional systems segregated on the basis of sex;

3. Failing to recruit and hire women into certain job categories, especially those above grade 13, because of their sex;

4. Maintaining policies and practices with respect to job assignments, transfer, promotion

and other terms and conditions of employment which unlawfully operate to deny equal opportunities to women because of their sex;

5. Failing to transfer and promote females to professional and managerial positions because of their sex;

6. Paying women in professional and managerial positions less than men doing substantially similar work;

7. Placing men in job classifications with extensive responsibility whereas women are allocated job classifications with responsibility levels below their capabilities;

8. Excluding women from management development programs within and outside the company;

9. Using an obscure and informal procedure for promotion to management and professional level positions whereby women are effectively kept from access to such positions;

10. Excluding females from employment based on characteristics generally attributable to women rather than on the basis of individual capabilities so as to create unreasonable obstacles to the advancement by females;

11. Failing and refusing to take reasonable steps to eliminate the effects of its previous policies and practices of discrimination on the basis of sex.

B. 1. Plaintiff was hired by defendant United System Service, Inc. on February 14, 1972, in its Industrial Relations Department.

2. Plaintiff duly commenced her work and performed her duties in a highly competent manner during her tenure with defendant.

3. During the period of her employment with defendant, plaintiff was frequently given indications that her work was performed in a satisfactory manner.

4. During the three years of plaintiff's employment with defendant, she had a good attendance record.

5. During the period of plaintiff's tenure with defendant she was consistently subjected to the effects of defendant's policies and practices of discrimination based on sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, including:

a. Plaintiff was hired into a position with lower pay and less responsibility than her qualifications and experience warranted; though later given a "promotion", her salary in the "promotion was below the minimum company salary level for her grade and she had

b. Plaintiff was allowed fewer training and advancement opportunities than males in her department with similar education, tenure and experience;

c. Plaintiff's "promotions" did not include salary increments and responsibility levels commensurate with promotions given to males within her department;

d. Defendant conducted a series of reorganizations of the department in which

plaintiff worked in which job classifications were redefined and responsibilities reallocated in such a way as to effectively reduce plaintiff's responsibilities and limit her opportunity for promotion while assuring higher pay and responsibilities for males in similar jobs within the department;

e. Plaintiff was inadequately advised of all details of promotional opportunities available to her within other subsidiaries of the United Telephone System which prevented her access to said promotions;

6. Plaintiff actively worked both within and outside the company to promote equal employment opportunities for women. Although such activities were originally assigned to her as part of her job responsibilities, she was later advised that pursuing same too aggressively would jeopardize her opportunity to advance within the company;

7. Plaintiff's protestation to her superiors that her own pay level and promotional opportunities were far below males with similar qualifications resulted in token corrective measures and warnings that her efforts to assure equal treatment would inhibit her advancement;

8. As a result of defendant's discrimination of her, plaintiff suffered emotional distress;

9. Defendant's policy of discrimination of plaintiff and harrassment because of her support of Title VII culminated in plaintiff's being summarily terminated from her job on May 9, 1975, without justification;

C. The effect, purpose and intent of the above policies and practices which defendants have pursued and are pursuing has been and continues to limit, segregate, classify, and discriminate against plaintiff female workers similarly situated throughout the United Telephone System in ways which jeopardize the jobs of and tend to deprive the said female workers of employment opportunities and otherwise adversely affect their status as employees because of their sex.

VIII.

PRAYER FOR RELIEF

A. Plaintiff and the class she represents are qualified for hiring, promotions, and transfers.

B. Plaintiff and the class she represents are now suffering and will continue to suffer from the defendants' policies, practices, customs and usages set forth herein.

C. Plaintiff and the class she represents have been and are being deprived of income in the form of wages and of prospective retirement benefits, social security and other benefits due to them as workers, solely because of their sex, in a sum to be proven at trial.

D. Since the time of her discharge on May 9, 1975, named plaintiff has been able to find only temporary employment. Plaintiff alleges that her inability to obtain further employment is a direct result of defendants' discrimination of her.

E. Plaintiff and the class she represents are entitled to have the actions herein alleged permanently enjoined because they have no plain, adequate, or complete remedy at law to redress these wrongs and are now suffering and will continue to suffer ir-

reparable injury from the defendants' policies, practices and customs as set forth herein, and an injunction is the only means of securing adequate relief.

F. Plaintiff and the class she represents are entitled to receive compensatory damages for lost wages and emotional distress resulting from the discrimination by defendants.

G. Plaintiff and the class she represents are entitled to reasonable attorneys' fees and their costs herein.

H. Plaintiff is entitled to reinstatement with the defendant at a position commensurate with her ability, education and experience.

WHEREFORE, plaintiff respectfully prays this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant a preliminary and permanent injunction enjoining the defendants and their officers, agents, successors, employees, attorneys, other representatives and those acting in concert with them and/or at their direction, enjoining them from continuing or maintaining any acts, policy, practice, custom or usage which discriminates against plaintiff, members of the class she represents, and any employee or applicant for employment, on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 53 U.S.C. § 2000e et seq., as amended, including policies, practices, customs and usages herein alleged.

2. Order defendants to grant plaintiff and the class she represents back pay from the appropriate

date for each in the amount of the difference between the wages they actually earned and the highest wages they would have earned absent the illegal discrimination against them by defendants, such back pay to include reimbursement for any possible overtime compensation, normal pay increases and fringe benefits including lost payments to pension funds and social security, all plus interest, and any other relief necessary to make whole all persons who have been adversely affected by the discriminatory policies and practices described herein and any further relief as the Court deems just and equitable.

3. Grant a preliminary injunction ordering defendants to grant plaintiff and all members of the class she represents reinstatement, where necessary, and the promotions they would have been entitled to but for defendants' illegal discrimination against them and order defendants to grant them the highest paying job systemwide to which they would be entitled absent defendants' illegal discrimination against them.

4. Due to the defendants' willful violation of the individual and class plaintiffs' rights, and the intentional discrimination against them, award plaintiff and the class she represents, by way of example, punitive damages in the amount of One Million Dollars ($1,000,000.00) against defendants.

5. Award plaintiff and the class she represents damages for their psychic losses, emotional distress, humiliation and severe mental anguish suffered as a result of defendants' discrimination against them in amount of Fifty Thousand Dollars ($50,000.00) for the plaintiff and each member of the class she represents.

6. Order defendants to institute and carry out such other policies, practices, and affirmative action programs which assure equal employment opportunities for females so as to eradicate the effects of defendants' past and present unlawful employment practices.

7. Allow plaintiff and the class she represents their costs herein and reasonable attorneys' fees.

8. Grant such additional relief as to the Court seems just, proper, and equitable.

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[Exhibits Deleted]

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 76-223-C2

PHYLLIS WILSON HOFFMAN, *et al.*,
Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

INTERVENOR'S COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343, and 1345. This is an action authorized and instituted pursuant to Sections 705(g)(6) and 706(f)(1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq. (Supp. V, 1975), (hereinafter referred to as Title VII).

2. The unlawful employment practices alleged below were and are now being committed within the State of Kansas and the judicial District of Kansas.

PARTIES

3. Intervenor, Equal Employment Opportunity Commission (hereinafter the "EEOC" or "Commis-

sion") is an agency of the United States charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to intervene in this action by Section 705(g)(6) and Section 706(f)(1) of Title VII.

4. Plaintiff Phyllis Wilson Hoffman is a female citizen of the United States and a resident of the State of Kansas. Plaintiff was employed by Defendant United System Service, Inc., and United Telecommunications, Inc., as part of the United Telephone System at its office in Westwood, Kansas. Defendant United System Service, Inc., terminated plaintiff Phyllis Wilson Hoffman's employment on May 9, 1975.

5. Since at least July 2, 1965, Defendant United Telecommunications, Inc., (hereinafter, "UTI") has continuously been and is now a Kansas corporation doing business in the State of Kansas and City of Westwood, Kansas. UTI utilizes materials and supplies which have crossed state lines. UTI has continuously employed and does now employ more than fifteen (15) persons.

Defendant UTI is a holding company which operates, administers and controls the United Telephone System which comprises the following subsidiaries and affiliates: United System Service, Inc.; Carolina Telephone & Telegraph Company; United Telephone Company of Ohio; Midwest Group which includes Capital City Telephone Company, United Telephone Company of Iowa; United Telephone Company of Kansas, Inc., United Telephone Company of Minnesota (Pioneer United), United Telephone Company of Missouri, United Telephone Company of Arkansas, Midstate Telephone Company, and United Telephone

Company of the West; United Telephone Company of Florida; Northwest Group which includes United Telephone Company of the Northwest, California-Oregon Telephone Company, and East Peninsula Telephone Company; Florida Telephone Corporation; Eastern Group which includes New Jersey Telephone Company, United Telephone Company of Pennsylvania (Peoples), and New Jersey Telephone Company; Gulf States-United Telephone Company (Palestine & Navasota merged into); Palo Pinto Telephone Company, Inc.; United Telephone Company of Indiana, Inc.; United Telephone Company of Michigan (Augusta); Southeast Group which includes United Inter-Mountain Telephone Company, and United Telephone Company of the Carolinas, Inc.; Keller Telephone Company; Alexandria Telephone Cable Company; Blacktown Telephone Company (subsidiary of United Telecommunications, Inc. operated by United Telephone Company of Pennsylvania); and Non-Telephone subsidiaries and affiliates including North Electric Company; ULI Leasing, Incorporated; North Electric Company Supply Division; Rixon Electronics, Inc.; United Computing Systems, Inc.; UCS, Inc.; United Business Communications; Central Kansas Power Company, Inc.; United System Service, Inc.; National Datacenter; CITCOM, Inc.; National Labortory of Urban Communications, Inc.; and the Citizens Ice Company.

Defendant United System Service, Inc., (hereinafter, "USSI") has continuously been and is now a Kansas corporation doing business in the State of Kansas and City of Westwood, Kansas. USSI utilizes materials and supplies which have crossed state lines. USSI has continuously employed and does now employ more than fifteen (15) persons.

Defendant USSI is a subsidiary of UTI and part of the United Telephone System and is the branch of that system which directly employed the plaintiff Phyllis Wilson Hoffman. At all times mentioned herein defendant USSI has been acting under practices, policies and procedures established by its parent corporation UTI especially with regard to personnel policies, so that whatever actions were taken by defendant USSI are attributable to defendant UTI. All acts alleged herein as committed by defendant USSI should be imputed as having also been the acts of defendant UTI.

6. Since at least July 2, 1965, the defendants listed above have continuously been and are now employers in an industry affecting commerce within the meaning of Section 701(b), (g), and (h) of Title VII.

7. Within three hundred (300) days of the occurrence of the acts of which plaintiff complains a charge was filed with the Commission alleging that the defendants had engaged in unlawful employment practices under Title VII.

8. Pursuant to plaintiff's request, the Commission advised her by letter that she was entitled to institute a civil action in the appropriate United States District Court within ninety (90) days of receipt of said letter. This action was instituted within that time period.

STATEMENT OF CLAIM

9. Since at least July 2, 1965, and continuously until the present time, the defendants have intentionally engaged in unlawful employment practices in violation of Section 703(a) of Title VII, which include but are not limited to the following:

a. Maintaining a system of recruitment and hiring into professional and managerial positions which discriminates against women because of their sex;

b. Maintaining a system of job classification which discriminates against professional and managerial women because of their sex;

c. Failure to promote female employees into professional and managerial positions because of their sex;

d. Discriminating against female professional and managerial employees with respect to their compensation because of their sex;

e. Conducting professional and managerial training programs which discriminate against women because of their sex;

f. Discriminating against professional and managerial female employees because of their sex with respect to discharge and other terms and conditions of employment.

10. The effect of the policies and practices complained of in Paragraph 9 above has been to deprive women of equal employment opportunities and otherwise to affect their status as employees because of their sex.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining the defendants, their officers, agents, employees, succcessors, assigns and all persons in active concert or par-

ticipation with them from engaging in any employment practice with discriminates because of sex.

B. Order the defendants to institute and carry out policies, practices, and affirmative action programs which provide equal employment opportunities for women and which eradicate the effects of the defendants' past and present unlawful employment practices.

C. Order the defendants to make whole those persons adversely affected by the unlawful employment practices described above, by providing appropriate back pay with interest, in an amount to be proved at trial, and other affirmative relief necessary to eradicate the effects of the defendants' unlawful employment practices.

D. Grant such further relief as the Court deems necessary and proper.

E. Award the Commission its costs in this action.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 76-223-C2

PHYLLIS WILSON HOFFMAN, *et al.*,
Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant for Intervention,
vs.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

EEOC MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

The claims raised by the Plaintiff in this case arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, as amended, *et seq.* (Supp. V, 1975) hereinafter cited as "Title VII." The Applicant for Intervention, Equal Employment Opportunity Commission ("EEOC" or "Commission"), is the agency of the United States established and empowered by Congress to interpret and enforce that Title. Sections 705(g)(6) and 706(f)(1) of Title VII, 42 U.S.C. Sections 2000e-(4)(g)(6) and (5)(f)(1) give the Commission authority to intervene in private actions brought under the Title to secure en-

forcement of employment rights protected by Title VII.

The Commission's right to intervene is the conditional right created by a statute of the United States referred to in Rule 24(b)(1) of the Federal Rules of Civil Procedure. That right is conditioned by two statutory requirements: that the Commission's application be timely and that the Commission certify that this action is one of general public importance.

The Commission motion to intervene is timely. Although plaintiffs' complaint was filed on November 5, 1976, the class has not yet been certified. Discovery has not yet been completed. Discovery being a critical and time-consuming aspect of most Title VII cases, the EEOC's participation at this juncture in the litigation could prove of assistance to the Court in the complilation and analysis of statistical data. The EEOC could also assist in the class delineation. The mere passage of time since the original complaint does not make the EEOC's motion untimely. Rather, timeliness is an issue which depends upon whether the case has progressed through significant stages of the litigation process. *Diaz* v. *Southern Drilling Corporation*, 427 F.2d 1118 (5th Cir. 1970); *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Co.*, 420 F.2d 1103 (5th Cir. 1970); *McDonald* v. *E.J. Lavino*, 430 F.2d 1065 (5th Cir. 1970); *Layne-New York Company* v. *Allied Asphalt Company*, 53 F.R.D. 529 (W.D. Pa. 1971); 3B *Moore's Federal Practice* 2d para. 24.13. See also *Iowa State University Research Foundation Inc.* v. *Honeywell, Inc.*, 459 F.2d 447 (8th Cir. 1972). In the instant case, only preliminary matters have been resolved; hence the EEOC's motion to intervene is in all respects timely.

Furthermore, by certificate which accompanies its motion, the Commission has certified that this case is one of general public importance. This action involves issues relating to the employment of women in higher level positions, issues which have received relatively little treatment from the courts. The Court will be faced with difficult issues revolving around subjective evaluations and personal factors of personnel decisions in professional and managerial jobs. The EEOC can assist the Court in these decisions. Also, the defendant is a large and visible employer, particularly in the Midwest and South, whose employment practices have an impact on the communications industry as a whole. Hence it is important that discrimination be eliminated from the employment practices of this company.

Rule 24(b)(1) Fed. R. Civ. P. requires that intervention shall not unduly delay or prejudice the original action. In its proposed complaint which accompanied the motion to intervene, the Commission makes allegations of unlawful practices which are substantially the same as those made by the plaintiff in her complaint. Both pleadings allege that the defendant has engaged in sex discrimination in the areas of hiring, recruitment, job classification, promotion, wages, training, and discharge. Thus the scope of the Commission's participation in the action is intended to be no greater than the scope of claims raised in plaintiff's complaint. Since no new claims are raised by the Commission, the proposed intervention cannot be deemed to depart form the "field of litigation" established by the original parties. See *In Re Willacy County Water Control and Improvement District*, 36 F. Supp. 36, 38 (S.D. Texas 1940).

EEOC intervention should cause no delay or duplication of efforts since the Commission will cooperate with plaintiff's counsel and coordinate all efforts toward discovery and trial preparation. There will be no delay in the discovery process since information necessary for plaintiff's case is nearly identical to that needed by the EEOC. The Commission will have no need to reopen matters already heard and decided by the Court.

Moreover, Commission participation in this case should help to expedite, rather than delay the proceedings. Because of its expertise and resources, the EEOC will be able to aid the Court and the parties in conducting discovery and formulating remedies which will eliminate discriminatory employment practices and provide relief to the victims of the unlawful practices. In this manner, the Commission can be instrumental in moving the action toward a swift but just conclusion.

Although the claims of EEOC and the plaintiff are virtually identical, the Commission seeks to intervene in this case in the public interest, which is the government's concern that this action for the enforcement of public rights be properly and effectively prosecuted. In furtherance of this governmental concern the EEOC, if intervention is permitted, will ensure that the evidence is fully developed and the legal issues clarified so that the Court can decide the issues on the best possible record.

The Commission, as the agency charged with the administration, interpretation and enforcement of Title VII, should be permitted to intervene in this action to ensure that the public interest in the elimination of discrimination is represented by more than

private interests, even where similar substantive claims are advanced by both the public and private complainants. See *Securities & Exchange Commission* v. *U.S. Realty and Improvement Co.*, 310 U.S. 434 (1940); *All American Airways, Inc.* v. *Cedarhurst*, 201 F.2d 273 (2d Cir. 1953); *United States* v. *Local 638, Enterprise Association*, 347 F. Supp. 164 (S.D.N.Y. 1972). As other courts have noted, the Commission, because of its unique expertise in Title VII law, would as intervenor be particularly able to assist materially in the adjudication of this case. *Thornton* v. *East Texas Motor Freight, Inc.*, 454 F.2d 197 (6th Cir. 1972); *Marshall* v. *Electric Hose and Rubber Co.*, 10 FEP cases 1071 (D.Del. 1974); *Sobel* v. *Yeshiva University*, No. 75-Civ. 2232 (GLG) (S.D.N.Y., filed May 31, 1977).

For the reasons stated above, the Commission urges that its Motion to Intervene be granted.

Respectfully submitted,

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Associate General Counsel

EARL HARPER, JR.
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DEBRA A. MILLENSON
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